

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

SPENCER PIERCE,  
 #61639

Plaintiff,

vs.

HOWARD SKOLNIK, *et al.*,

Defendants.

3:10-cv-00464-HDM-VPC

**ORDER**

This is a prisoner civil rights action filed pursuant to 42 U.S.C. § 1983. Plaintiff's application to proceed *in forma pauperis* is granted (docket #1). The court now reviews the complaint.

**I. Screening Standard**

Pursuant to the Prisoner Litigation Reform Act (PLRA), federal courts must dismiss a prisoner's claims, "if the allegation of poverty is untrue," or if the action "is frivolous or malicious," "fails to state a claim on which relief may be granted," or "seeks monetary relief against a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2). A claim is legally frivolous when it lacks an arguable basis either in law or in fact. *Nietzke v. Williams*, 490 U.S. 319, 325 (1989). The court may, therefore, dismiss a claim as frivolous where it is based on an indisputably meritless legal theory or where the factual contentions are clearly baseless. *Id.* at 327. The critical inquiry is whether a

1 constitutional claim, however inartfully pleaded, has an arguable legal and factual basis. *See Jackson*  
2 *v. Arizona*, 885 F.2d 639, 640 (9<sup>th</sup> Cir. 1989).

3 Dismissal of a complaint for failure to state a claim upon which relief may be granted is  
4 provided for in Federal Rule of Civil Procedure 12(b)(6), and the court applies the same standard under  
5 Section 1915(e)(2) when reviewing the adequacy of a complaint or amended complaint. Review under  
6 Rule 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Laboratory Corp. of America*,  
7 232 F.3d 719, 723 (9th Cir. 2000). A complaint must contain more than a “formulaic recitation of the  
8 elements of a cause of action;” it must contain factual allegations sufficient to “raise a right to relief  
9 above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1965  
10 (2007). “The pleading must contain something more...than...a statement of facts that merely creates a  
11 suspicion [of] a legally cognizable right of action.” *Id.* In reviewing a complaint under this standard,  
12 the court must accept as true the allegations of the complaint in question, *Hospital Bldg. Co. v. Rex*  
13 *Hospital Trustees*, 425 U.S. 738, 740 (1976), construe the pleading in the light most favorable to  
14 plaintiff and resolve all doubts in the plaintiff’s favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969).

15 Allegations in a *pro se* complaint are held to less stringent standards than formal  
16 pleadings drafted by lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404 U.S.  
17 519, 520-21 (1972) (*per curiam*); *see also Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th  
18 Cir. 1990). All or part of a complaint filed by a prisoner may be dismissed *sua sponte*, however, if the  
19 prisoner’s claims lack an arguable basis either in law or in fact. This includes claims based on legal  
20 conclusions that are untenable (*e.g.* claims against defendants who are immune from suit or claims of  
21 infringement of a legal interest which clearly does not exist), as well as claims based on fanciful factual  
22 allegations (*e.g.* fantastic or delusional scenarios). *See Neitzke*, 490 U.S. at 327-28; *see also McKeever*  
23 *v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

1 To sustain an action under section 1983, a plaintiff must show (1) that the conduct  
 2 complained of was committed by a person acting under color of state law; and (2) that the conduct  
 3 deprived the plaintiff of a federal constitutional or statutory right.” *Hydrick v. Hunter*, 466 F.3d 676, 689  
 4 (9<sup>th</sup> Cir. 2006).

## 5 **II. Instant Complaint**

6 Plaintiff, who is incarcerated at Ely State Prison (“ESP”), states that he is an Iowa inmate,  
 7 in Nevada “by way of interstate compact.” He has sued Nevada Department of Corrections (“NDOC”)   
 8 Director Howard Skolnik, program officer Paula G. Miller, ESP warden E.K. McDaniel and several  
 9 Iowa Department of Corrections defendants. Plaintiff claims that defendants have violated his  
 10 Fourteenth Amendment due process rights with respect to his eligibility for parole in Iowa, and have  
 11 violated his constitutional right to access to the courts by not providing access to Iowa legal materials  
 12 at ESP.

13 First, plaintiff has named three defendants at the Iowa Department of Corrections for  
 14 violating his due process rights in connection to his Iowa parole. However, the federal venue statute  
 15 requires that a civil action, other than one based on diversity jurisdiction, be brought only in “(1) a  
 16 judicial district where any defendant resides, if all defendants reside in the same state, (2) a judicial  
 17 district in which a substantial part of the events or omissions giving rise to the claim occurred, or a  
 18 substantial part of the property that is the subject of the action is situated, or (3) a judicial district in  
 19 which any defendant may be found, if there is no district in which the action may otherwise be brought.”  
 20 28 U.S.C. § 1391(b). “The district court of a district in which is filed a case laying venue in the wrong  
 21 division or district shall dismiss, or if it be in the interests of justice, transfer such case to any district  
 22 in or division in which it could have been brought.” 28 U.S.C. § 1406(a). Here, the Iowa Department  
 23 of Corrections defendants reside in Iowa, and their alleged actions or omissions giving rise to plaintiff’s  
 24 claims occurred in Iowa. Accordingly, plaintiff’s Fourteenth Amendment claims against the Iowa  
 25 defendants and Paula G. Miller and E.K. McDaniel are dismissed without prejudice for lack of proper  
 26 venue. Defendants John Baldwin, Director of DOC II, James Brown, Elizabeth Robinson, Paula G.

1 Miller and E.K. McDaniel are dismissed from this action.

2           Next, plaintiff claims that he has been denied any access to Iowa legal materials,  
3 including the local rules of civil procedure. He cites several specific filings that he has been unable to  
4 complete, and alleges that he has written to Howard Skolnik about the lack of access without result.  
5 Prisoners have a constitutional right of access to the courts. *See Lewis v. Casey*, 518 U.S. 343, 346  
6 (1996); *Bounds v. Smith*, 430 U.S. 817, 821 (1977), *limited in part on other grounds by Lewis*, 518 U.S.  
7 at 354; *Ching v. Lewis*, 895 F.2d 608, 609 (9<sup>th</sup> Cir. 1990). This right “requires prison authorities to assist  
8 inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate  
9 law libraries or adequate assistance from persons trained in the law.” *Bounds*, 430 U.S. at 828; *see also*  
10 *Madrid v. Gomez*, 190 F.3d 990, 995 (9<sup>th</sup> Cir. 1999). The right, however, “guarantees no particular  
11 methodology but rather the conferral of a capability – the capability of bringing contemplated challenges  
12 to sentences or conditions of confinement before the courts . . . . [It is this capability] rather than the  
13 capability of turning pages in a law library, that is the touchstone” of the right of access to the courts.  
14 *Lewis*, 518 U.S. at 356-57. Prison officials may select the best method to ensure that prisoners will have  
15 the capability to file suit. *See id.* at 356. Prisons “might replace libraries with some minimal access to  
16 legal advice and a system of court-provided forms . . . that asked the inmates to provide only the facts  
17 and not to attempt any legal analysis.” *Id.* at 352.

18           To establish a violation of the right of access to the courts, a prisoner must establish that  
19 he or she has suffered an actual injury, a jurisdictional requirement that flows from the standing doctrine  
20 and may not be waived. *See Lewis*, 518 U.S. at 349; *Madrid*, 190 F.3d at 996. An “actual injury” is  
21 “actual prejudice with respect to contemplated or existing litigation, such as the inability to meet a filing  
22 deadline or to present a claim.” *Lewis*, 518 U.S. at 348 (citation and internal quotations omitted); *see*  
23 *also Alvarez v. Hill*, 518 F.3d 1152, 1155 n.1 (9<sup>th</sup> Cir. 2008) (explaining that “[f]ailure to show that a  
24 ‘non-frivolous legal claim ha[s] been frustrated’ is fatal” to a claim for denial of access to legal  
25 materials) (citing *Lewis*, 518 U.S. at 353 & n.4); *Madrid*, 190 F.3d at 996. Delays in providing legal  
26 materials or assistance that result in actual injury are “not of constitutional significance” if “they are the

1 product of prison regulations reasonably related to legitimate penological interests.” *Lewis*, 518 U.S.  
2 at 362. The right of access to the courts is limited to non-frivolous direct criminal appeals, *habeas*  
3 *corpus* proceedings, and § 1983 actions. *See Lewis*, 518 U.S. at 353 n.3 & 354-55; *Simmons v.*  
4 *Sacramento County Superior Court*, 318 F.3d 1156, 1159-60 (9<sup>th</sup> Cir. 2003) (explaining that “a prisoner  
5 has no constitutional right of access to the courts to litigate an unrelated civil claim.”); *Madrid*, 190 F.3d  
6 at 995. Plaintiff states a claim for violation of his right of access to the courts against defendant Skolnik.

### 7 **III. Conclusion**

8 **IT IS THEREFORE ORDERED** that plaintiff’s application to proceed *in forma*  
9 *pauperis* (docket #1) without having to prepay the full filing fee is **GRANTED**; plaintiff shall not be  
10 required to pay an initial installment fee. Nevertheless, the full filing fee shall still be due, pursuant to  
11 28 U.S.C. § 1915, as amended by the Prisoner Litigation Reform Act of 1996. The movant herein is  
12 permitted to maintain this action to conclusion without the necessity of prepayment of fees or costs or  
13 the giving of security therefor. This order granting *in forma pauperis* status shall not extend to the  
14 issuance of subpoenas at government expense.

15 **IT IS FURTHER ORDERED** that, pursuant to 28 U.S.C. § 1915, as amended by the  
16 Prisoner Litigation Reform Act of 1996, the Nevada Department of Corrections shall pay to the Clerk  
17 of the United States District Court, District of Nevada, 20% of the preceding month’s deposits to the  
18 account of Spencer Pierce, **Inmate No. 61639** (in months that the account exceeds \$10.00) until the full  
19 \$350 filing fee has been paid for this action. The Clerk shall send a copy of this order to the attention  
20 of Albert G. Peralta, Chief of Inmate Services for the Nevada Department of Prisons, P.O. Box 7011,  
21 Carson City, NV 89702.

22 **IT IS FURTHER ORDERED** that, even if this action is dismissed, or is otherwise  
23 unsuccessful, the full filing fee shall still be due, pursuant to 28 U.S.C. §1915, as amended by the  
24 Prisoner Litigation Reform Act of 1996.

25 **IT IS FURTHER ORDERED** that the Clerk shall file the complaint (docket #1-1).  
26

1                   **IT IS FURTHER ORDERED** that plaintiff's Fourteenth Amendment due process claim  
2 is **DISMISSED** without prejudice for lack of proper venue.

3                   **IT IS FURTHER ORDERED** that defendants John Baldwin, Director of DOC II, James  
4 Brown, Elizabeth Robinson, Paula G. Miller and E.K. McDaniel are **DISMISSED** from this action.

5                   **IT IS FURTHER ORDERED** that plaintiff's access to courts claim against defendant  
6 Skolnik **MAY PROCEED**.

7                   **IT IS FURTHER ORDERED** as follows:

8                   1. The Clerk shall electronically serve a copy of this order, including the attached Notice  
9 of Intent to Proceed with Mediation form, along with a copy of plaintiff's complaint, on the Office  
10 of the Attorney General of the State of Nevada, to the attention of Pamela Sharp.

11                   2. The Attorney General's Office shall advise the Court within **twenty-one (21) days** of the date  
12 of entry of this order whether it can accept service of process for the named defendants. As to any of  
13 the named defendants for which the Attorney General's Office cannot accept service, the Office shall  
14 file, *under seal*, the last known address(es) of those defendant(s).

15                   3. If service cannot be accepted for any of the named defendant(s), plaintiff shall file a motion  
16 identifying the unserved defendant(s), requesting issuance of a summons, and specifying a full name and  
17 address for said defendant(s). Plaintiff is reminded that, pursuant to Rule 4(m) of the Federal Rules of  
18 Civil Procedure, service must be accomplished within one hundred twenty (120) days of the date the  
19 complaint was filed.

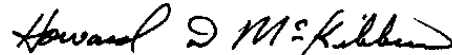
20                   4. If the Attorney General accepts service of process for any named defendant(s), such  
21 defendant(s) shall file and serve an answer or other response to the complaint within **thirty (30) days**  
22 following the date of the early inmate mediation. If the court declines to mediate this case, an answer  
23 or other response shall be due within **thirty (30) days** following the order declining mediation.

24                   5. The parties **SHALL DETACH, COMPLETE, AND FILE** the attached Notice of Intent to  
25 Proceed with Mediation form on or before **thirty (30) days** from the date of entry of this order.

26                   **IT IS FURTHER ORDERED** that henceforth, plaintiff shall serve upon defendants, or,

1 if an appearance has been made by counsel, upon their attorney(s), a copy of every pleading, motion, or  
2 other document submitted for consideration by the court. Plaintiff shall include with the original paper  
3 submitted for filing a certificate stating the date that a true and correct copy of the document was mailed  
4 to the defendants or counsel for defendants. If counsel has entered a notice of appearance, the plaintiff  
5 shall direct service to the individual attorney named in the notice of appearance, at the address stated  
6 therein. The court may disregard any paper received by a district judge or a magistrate judge that has  
7 not been filed with the Clerk, and any paper which fails to include a certificate showing proper service.

8 DATED this 16<sup>th</sup> day of November, 2010.

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11 UNITED STATES DISTRICT JUDGE  
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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

_____ ,	)	Case No. _____
Plaintiff,	)	
	)	
v.	)	<b>NOTICE OF INTENT TO</b>
	)	<b>PROCEED WITH MEDIATION</b>
_____	)	
	)	
Defendants.	)	
_____	)	

This case may be referred to the District of Nevada's early inmate mediation program. The purpose of this notice is to assess the suitability of this case for mediation. Mediation is a process by which the parties meet with an impartial court-appointed mediator in an effort to bring about an expedient resolution that is satisfactory to all parties.

1. Do you wish to proceed to early mediation in this case? \_\_\_\_ Yes \_\_\_\_ No
2. If no, please state the reason(s) you do not wish to proceed with mediation? \_\_\_\_\_  
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3. List any and all cases, including the case number, that plaintiff has filed in federal or state court in the last five years and the nature of each case. (Attach additional pages if needed).  
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1 4. List any and all cases, including the case number, that are currently pending or any pending  
2 grievances concerning issues or claims raised in this case. (Attach additional pages if needed).

3 \_\_\_\_\_  
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6 5. Are there any other comments you would like to express to the court about whether this case is  
7 suitable for mediation. You may include a brief statement as to why you believe this case is  
8 suitable for mediation. (Attach additional pages if needed).

9 \_\_\_\_\_  
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12 **This form shall be filed with the Clerk of the Court on or before thirty (30) days from the  
13 date of this order.**

14 Counsel for defendants: By signing this form you are certifying to the court that you have  
15 consulted with a representative of the Nevada Department of Corrections concerning participation in  
16 mediation.

17 Dated this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

18 \_\_\_\_\_  
19 Signature

20 \_\_\_\_\_  
21 Name of person who prepared or  
22 helped prepare this document  
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